INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statement	2
Reasons for Granting the Writ	6
1. The courts below have decided a question of general importance in which they did not give proper effect to applicable decisions of this Court	6
2. The courts below have so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision	8
Conclusion	9
Appendix	
Exhibit A—Final Judgment of the District Court	1a
Exhibit B—Judgment of the Court of Appeals	3a
Exhibit C—Complaint	6a

INDEX OF CITATIONS

CASES:

Bell v. Burson, 402 U.S. 434	8
Board of Regents v. Roth, 408 U.S. 564	6, 8
Boddie v. Connecticut, 401 U.S. 371	8
Fuentes v. Shevin, 407 U.S. 67	6, 8
Goldberg v. Kelly, 397 U.S. 254	8
Perry v. Sindermann, 408 U.S. 593	6, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

ROBERT E. HARNEY and JOSEPH C. BOULDER,
Petitioners

v.

JOHN F. GRINER, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Robert E. Harney and Joseph C. Boulder, plaintiffs and appellants below and petitioners here, pray that a writ of certiorari issue to review the part of the Judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on June 8, 1973, which affirmed the part of the decision of the trial court, entered July 27, 1971, which granted summary judgment to defendant, the Secretary of the Department of Health, Education and Welfare.

OPINIONS BELOW

The findings and conclusions of Judge George B. Hart, Jr., of the United States District Court for the District of Columbia upon which he granted defendant's motion for summary judgment in this Government employees case, which appear in Appendix B, *infra,* are not officially reported. The United States Court of Appeals for the District of Columbia Circuit affirmed *per curiam,* without opinion. Its Judgment, which appears in Appendix A, *infra,* is not officially reported.

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was made and entered on June 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an agency of the Federal Government which places two of its employees in A.W.O.L. status, even when they are actually physically present and performing the duties they have performed for years, without affording them the opportunity for an evidentiary hearing prior to withholding their pay denies the employees procedural due process in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

STATEMENT

At all material times, petitioners Robert E. Harney and Joseph C. Boulder were GS-13 members of the competitive civil service employed by the Bureau of Hearings and Appeals (BHA) of the Social Security Administration (SSA) of the Department of Health,

Education and Welfare (DHEW) of the United States Government. They were also president and vice-president, respectively, of their union local (No. 2340) affiliated with the American Federation of Government Employees (AFGE) (App. C, ¶1). By a 1968 "Basic Agreement" between the Local and BHA, management of BHA authorized "a reasonable amount of official time to union officers and stewards to carry out employee-management cooperative functions including prearranged scheduled time periods for consultations with employees and unscheduled time for situations which cannot be scheduled in advance" (App. C. ¶8). Directives by management in BHA, in effect since 1963, required these petitioners, as officers of their Local, to devote their full time each day to grievance proceedings and kindred personnel problems of the employees of BHA, which duties were identified in BHA as "employee-management cooperative functions". (App. C, ¶5).

According to the complaint in this case (App. C), management began to resent the effectiveness of petitioners' services on behalf of the employees and finally became completely disenchanted with them when, in March of 1970, they publicly criticized the personnel policies of BHA, AFGE and the Civil Service Commission. (App. C, ¶¶9, 13, 15). The acting director of BHA undertook, unilaterally, to terminate the "Basic Agreement" between the Local and BHA; misrepresented a new Executive Order (No. 11491) as prohibiting further discharge by petitioners of their "employee-management cooperative functions" during "official time"; and issued a memorandum order, dated August 3, 1970, which forbade all such activities on "official time" unless each activity first received the

explicit approval and sanction of the respective immediate supervisors of the two petitioners. (App. C, ¶16).

Petitioners challenged the validity of the attempted termination of the "Basic Agreement"; the legitimacy of the interpretation of Executive Order No. 11491; and the legality of the new procedure to be established by the memorandum order and had invoked intervention by the Federal Mediation and Conciliation Service and the Federal Labor Relations Council. (App. C, ¶¶14 and 16). Management ignored the Service and the Council and directed that petitioners were to be recorded as absent without leave for any time they spent during "official time" on "employee-management cooperative functions" without first having obtained the prescribed prior approval. (App. C, ¶16). This was to continue until petitioners agreed to submit to the terms of the memorandum order and abandon their obligations to the employees. Petitioners reported to work each day, continued to perform their usual "employee-management cooperative functions" as they and their predecessors in the union offices had done since 1963, with frequent face-to-face meetings with their superiors including the acting director of BHA. They claimed the right to do this under the provisions of the "Basic Agreement", which they contended had not been terminated. Each day that they did so (August 7, 1970 to January 21, 1971) they were recorded as A.W.O.L. This resulted, of course, in a deprivation of salary for those days. This was accomplished without letters of charges to or answers by petitioners and without any semblance of a hearing to challenge the bases of the action, that is the termination of the "Basic Agreement", the Executive Order, and the August 3, 1970 memorandum

order. Petitioners appealed to the Civil Service Commission in October of 1970. Their appeal was denied on March 15, 1971 by the Commission's Board of Appeals and Review on the stated grounds that the A.W.O.L. determinations with the withholding of the salaries were not "adverse actions" and that the Commission, therefore, had no jurisdiction over the appeals. Petitioners had filed their suit in the United States District Court for the District of Columbia on November 20, 1970. They asked, among other things, that the Court declare the A.W.O.L. determinations illegal and award them their regular pay for the time they had spent, from August 7, 1970 to the time of decision, during "official time" on "employee-management cooperative functions". (App. C, ¶3). Officers of AFGE were joined as defendants on an allegation that, by suspending the Local on false charges, they had acted in concert with the Government defendants in depriving petitioners of their salaries.

The Government defendants did not file an answer to the complaint. They, without affidavits, moved to dismiss or for summary judgment and on July 27, 1971, the Court below granted their alternative motion. The Court's "Final Judgment as to Claims Asserted Against Government Defendants" (App. B), referred to a minor claim to money in an "escrow account" asserted by the Local in its complaint but completely ignored the much more important request by petitioners for a review of the action of management in depriving them of their pay by recording them as A.W.O.L. when they were, in fact, at all times material to this case, actually physically present and performing their usual functions in the offices set aside for them by management for that very purpose.

Petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit and, on November 9, 1972, made a timely filing of their brief. The Government defendants-appellees filed no brief. On May 10, 1973, the Court, *sua sponte*, placed the case on their Summary Calendar, thereby limiting the time for oral argument. By a letter dated May 29, 1973, petitioners, by counsel, told the Court and the parties that, at oral argument, they would call the Court's attention to *Board of Regents* v. *Roth,* (1972) 408 U.S. 564; *Perry* v. *Sindermann,* (1972) 408 U.S. 593; and *Fuentes* v. *Shevin,* (1972) 407 U.S. 67 as controlling on the due process issue in the A.W.O.L. determinations. By an order entered June 6, 1973, the Court, again *sua sponte,* refused to hear oral argument. (N.B. The remarks of the Chief Justice to the American Bar Association on such actions, as reported in the Washington Evening Star for August 6, 1973, are pertinent). On June 8, 1973, the Court, without an opinion, handed down its *per curiam* judgment affirming the orders of the District Court. On June 10, 1973, the Government appellees filed a brief which the Court accepted. It is the action of the Court of Appeals in affirming the order granting summary judgment to defendant, the Secretary of the Department of Health, Education and Welfare, on the A.W.O.L. and pay issue which petitioners ask this Court to review on certiorari.

REASONS FOR GRANTING THE WRIT

1. The United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit have, mayhap unwittingly, decided a question of general importance and application in the process of which

they did not give proper effect to applicable decisions of this Court. It is true that the District Court, in dismissing the complaint herein (App. C), did not rule specifically on the question presented by petitioners' complaint of whether they were entitled under applicable law and the Constitution of the United States to a letter of charges, an opportunity to answer orally or in writing or both, a hearing, and a written decision on the charges before they could be deprived of their salaries. There can be no doubt but that salaries are property protected by the Constitution. It is equally true that the Court, evidently bemused by the "escrow account", did not mention in its "Final Judgment" petitioners' request for a review of the A.W.O.L. determinations and an award of back pay. It is apparent from the rhetoric of the "Final Judgment" that the Court did not have that problem in mind at all when he signed the paper prepared and presented to him by the United States Attorney. It may have been an oversight on the part of the Court or it may have been because he was misled by the arguments presented to him by the United States Attorney in his written and oral presentations. For example, in his written argument, the United States Attorney argued that the case should be dismissed because petitioners had not exhausted their administrative remedies because they had not appealed to the Civil Service Commission from a firing action, although nonesuch had been initiated by management. The same United States Attorney argued orally to the Court that, since petitioners were union officers they should be relegated to some obscure, and actually non-existent, procedure in the Department of Labor for a redress of whatever grievances they professed to have. *Quaere*: Does a Federal employee who accepts responsibility as an em-

ployee representative forfeit rights which he as a Federal employee would have? The United States attorney featured the "escrow account" in his written and oral arguments. Whatever the reason for it, the failure of the District Court to rule on the real question presented to it and the affirming action, without more, by the Court of Appeals allowed the baby to go down the drain with the bath water and denied petitioners the right to a decision in point. The decisions below do not give proper effect to the long line of decisions, some very recent, of this Court which say that a person may not be deprived of his property (in this case money) without a prior evidentiary hearing. Those cases include *Goldberg* v. *Kelly,* 397 U.S. 254; *Boddie* v. *Connecticut,* 401 U.S. 371; *Bell* v. *Burson,* 402 U.S. 535; *Fuentes* v. *Shevin,* 407 U.S. 67; *Board of Regents* v. *Roth,* 409 U.S. 546; and *Perry* v. *Sindermann,* 408 U.S. 593.

2. The United States Court of Appeals for the District of Columbia Circuit has so far sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings and has itself so far perpetrated a like departure as to call for an exercise of this Court's power of supervision. It is not the accepted and usual course of judicial proceedings for the United States Attorney to misrepresent a case to the Court. Yet the United States Attorney did this as was inferentially admitted by the author of the Government appellees' brief. But that brief was not filed until after the Court of Appeals had released its *per curiam* judgment upholding the United States Attorney. When there is more than one court in a complaint or when the complaint prays for relief of more than one kind, it is the accepted and usual course of

judicial proceedings for the Court, in granting summary judgment, to deal with all of the counts and all of the prayers for relief. But that is not what the trial court did. The Court did not rule on the issue of deprivation of property without due process of law. It is also a very unusual proceeding for a Court of Appeals to place a case on its Summary Calendar for argument and then deny the right to oral argument. Usually, the Court refuses to hear argument from a party which does not file a brief but allows the party which has filed a brief to argue.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the Court of Appeals vacated and the case remanded to the District Court for proper and adequate consideration on the merits.

Respectfully submitted,

BYRON N. SCOTT
Counsel for Petitioners
626 A Street, S.E.
Washington, D.C. 20003

APPENDIX

Exhibit A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1789

SEPTEMBER TERM, 1972

Civil Action 3434-70

ROBERT E. HARNEY, President, Local #2340, American Federation of Government Employees, AFL-CIO, et al, *Appellants*

v.

JOHN F. GRINER, President, American Federation of Government Employees, AFL-CIO, et al, *Appellees*

No. 72-1817

No. 72-1817

ROBERT E. HARNEY, President, Local #2340, American Federation of Government Employees (AFL-CIO), et al, *Appellants*

v.

JOHN F. GRINER, President, American Federation of Government Employees (AFL-CIO), et al.

Appeals from the United States District Court for the District of Columbia

Before: Bazelon, Chief Judge, Wilkey, Circuit Judge, and Kaufman,* United States District Judge for the District of Maryland

Judgment

These causes came on for consideration on the record on appeal from the United States District Court for the District of Columbia. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

The trial court granted motions for summary judgment for appellees in both cases. Appellants claim these decisions were in error; but they have produced neither compelling arguments nor persuasive authority to support that proposition.

Accordingly, it is ORDERED AND ADJUDGED by this Court that the Orders of the District Court appealed from in these causes are hereby affirmed.

Per Curiam.
For the Court.

HUGH E. KLINE
Clerk

* Sitting by designation pursuant to 28 U.S.C. § 294(d)

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action

No. 3434-70

Filed July 27, 1971 James F. Davey, Clerk

Final Judgment as to Claims Asserted Against Government Defendants

This cause having come before the Court for hearing on Government defendants' motion to dismiss and, alternatively, for summary judgment, and plaintiffs' opposition thereto; upon inquiry being made by the Court at the hearing, the United States Attorney, upon consultation with Government defendants, having stipulated that the United States of America will, following entry of this judgment, voluntarily deposit in the Registry of the Court the $335.48 cumulated dues-check-off-allotment payments now being held in an "Escrow Account", to be disbursed pursuant to Court order in accordance with such final court (or court-approved) determination as is made settling the dispute between the plaintiff local labor organization and defendant American Federation of Labor (AFL-CIO) on their adverse claims to these funds;

Upon consideration of the argument of counsel, the record, and the memoranda of the parties; and the Court at that hearing having expressly determined and orally ordered that, upon such deposit of the funds being made by the United States, final judgment shall now be entered dismissing Government defendants from this litigation;

Plaintiffs having on July 14, 1971, filed a motion for reconsideration, and for extension of time in which to file a brief thereon, and the Court having given that motion due consideration, and having determined that motion should be denied,

It is by the Court this 27th day of July, 1971,
ORDERED AND ADJUDGED:

1. That, upon the United States voluntarily depositing the $335.48 cumulated dues-check-off allotment payments "escrow account" funds in the Registry of this Court, the motion of Government defendants be, and it hereby is, granted, as follows:

(a) The claims asserted by plaintiffs against Government defendants in their official capacities which are based upon Executive Order 11491 (the President's current Executive Order Regulating Labor-Management Relations in the Federal Service) are dismissed for want of subject-matter jurisdiction. (See *Bronx-Manhattan Postal Union* v. *Grounouski,* 121 U.S. App. D.C. 321, 326-327, 350 F.2d 451, 456-457 (1965), *cert. denied* 382 U.S. 978 (1966).)

(b) As for the claims asserted by plaintiffs personally against Government defendants Finch, Cramer, Richardson and Farmer (for actions taken in course of, or in connection with, their official duties), dismissal is directed on the basis that these Government defendants are entitled to summary judgment on those claims. (See *Barr* v. *Matteo,* 360 U.S. 564 (1959).)

2. Upon the deposit being made in the Registry of the Court in accordance with paragraph 1 above, the Clerk of Court is expressly directed in accordance with Rule 54(b), F.R.C.P., to enter final judgment dismissing this action as to Government defendants Finch, Cramer, Richardson and Farmer, based upon this Court's express determination that there is no just reason for delay in the entry of such final judgment as to them.

3. A further stay pending application to the Court of Appeals is hereby granted, staying the administrative discharge proceedings instituted by the Department of Health, Education and Welfare against plaintiffs Harney and Boulder, on condition that plaintiffs shall file their appeal

to the Court of Appeals from this final judgment within 30 days from the date of entry hereof; and this further stay pending application to the Court of Appeals shall expire sixty days from the date plaintiffs file their appeal from this final judgment.

United States District Judge

Exhibit C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3434-70

Complaint for Accounting for Money Illegally Withheld, for Damages Therefor, and for Damages for Unfair Labor Practices

Jurisdiction of this Court is conferred by Title II, § 521, D. C. Code (1967). The amount in controversy exceeds the sum of $10,000.00 exclusive of costs.

1. Plaintiff Robert E. Harney is and has been since May 1, 1966, the duly elected President and plaintiff Joseph C. Boulder is and has been since May 1, 1969, the duly elected Vice President of Local No. 2340, American Federation of Government Employees (AFL-CIO), hereinafter called the Local, at the Bureau of Hearings and Appeals, hereinafter called BHA, of the Department of Health, Education, and Welfare, hereinafter called DHEW. Both of said plaintiffs are residents of the State of Maryland and bring this suit in their own behalf and as officers of plaintiff Local and as representatives of those of its members who have been adversely affected by the acts and deeds hereinafter set forth. Plaintiff Local was chartered in October, 1963, and was formally recognized by BHA in March, 1964.

2. Defendant John F. Griner is the President of the American Federation of Government Employees (AFL-CIO), hereinafter called AFGE. Defendant Robert H. Finch was from January, 1969, to June 24, 1970, Secretary of DHEW. Defendant Virginia L. Cramer is Chief of the Payroll Reports and Accounts Branch of the Division of Accounting Operations, DHEW. Defendant Esther F. Johnson was, at the times material as to her, National Secretary-Treasurer of AFGE. Defendant Elliot L. Richardson is and since June 24, 1970, has been the Secretary of DHEW. Defendant James Farmer has been Assistant

Secretary for Administration, DHEW, since April 4, 1969. All of the defendants reside officially in the District of Columbia.

3. On February 17, 1965, DHEW agreed with AFGE "to permit the withholdings of dues for any member of AFGE who is employed in the Department and who is a member of a Lodge which has adopted a Memorandum of Understanding covering the withholding of dues." A Memorandum of Understanding was signed by the Local and BHA on July 8, 1965. By the terms of the "Understanding" BHA undertook to withhold each pay period from the pay check of any employee member, who made a written voluntary allotment to the Local, the designated dues and to pay the amount so withheld over to the Treasurer of the Local each pay period. The withholding and paying were to continue until the employee member who had made the voluntary allotment filed a "Revocation of Voluntary Authorization for Allotment of Compensation for Payment of Employee Organization Dues."

4. The Local won exclusive recognition in BHA effective on January 26, 1966. Contract negotiations between the Local and BHA began on August 4, 1966. BHA management wanted neither a union nor employee-management cooperation.

5. From on or about May 1, 1966, plaintiff Harney as President and plaintiff Boulder, first as Chief Steward and then as Vice President, spent full-time on "union business", as had their predecessors in office since approximately 1963.

6. On or about July 20, 1967, BHA accepted the principle of impartial mediation of negotiation impasses.

7. On May 9, 1968, the Local with full approval of defendant Griner filed charges of unfair labor practices against Charles M. Erisman, James H. Nease, and others over the move of BHA to Arlington, Virginia. The action

was endorsed in writing by defendant Griner on May 16, 1968, with a promise of further support. Thereafter, on July 19, 1968, at its own expense, the Local filed an unsuccessful suit in the United States District Court for the District of Columbia to enjoin the move. Members' dues were used, as authorized, to pay the costs of the action and the Local, as a result did not pay its per capita taxes to the National Office of AFGE beginning with the October, 1968, payment and continuing through July, 1969.

8. On August 29, 1968, the negotiators for the Local and BHA agreed to the terms of a Basic Agreement between the two. This was signed by the negotiators and approved by the BHA Director on October 14, 1968. On March 14, 1969, after the 1968 Presidential election and inauguration, the Basic Agreement was approved by DHEW. Under Article (9) management authorized "a reasonable amount of official time to union officers and stewards to carry out employee-management cooperative functions including prearranged scheduled time periods for consultations with employees and unschedulued time for situations which cannot be scheduled in advance." Article (19) provided that an Article on Merit Staffing would be negotiated in a supplemental agreement. Article (31) provided that

> "This agreement shall take effect immediately upon approval of the Secretary of HEW [March 14, 1969] and shall remain in effect for one year [March 14, 1970]. Thereafter, it shall renew itself for yearly periods unless written notice is given by either party to the other not less than sixty (60) days nor more than (90) days prior to expiration date or any extension thereof, that it is desired to terminate or amend the agreement. In the event notice is given the parties shall begin negotiations within forty-five days. If these negotiations are not completed prior to the expiration date, any existing impasse may be submitted to mediation as set forth in Article (13)."

9. Immediately after the approval of the agreement the management of BHA, with the full knowledge and approval of defendant Finch as Secretary of DHEW, determined to and began a course of action designed to eliminate the Local and cause the separation of its officers.

10. On August 15, 1969, plaintiffs Harney and Boulder met with defendant Griner and one Ralph Biser, a National Vice President of AFGE, and agreed that if the Local would pay their per capita taxes for May, June, July, and August, 1969, the Local would be given credit for October, 1968 to April, 1969, inclusive, and would be held to be current. August taxes of $89.10 were paid on August 21, 1969, and the May, June, and July taxes totaling $448.20 were paid by October 4, 1969. Per capita taxes of the Local were paid regularly after August 21, 1969.

11. Executive Order 11491 was issued on October 29, 1969.

12. On January 6, 1970, plaintiff Harney told the Federal Services Impasses Panel of the Federal Labor Relations Council that negotiations on merit staffing (Article 19) had been stalemated since August 4, 1966; that the matter had been referred to Commissioner Harold Mills, Federal Mediation Conciliation Service, who had that day informed the Local that "an impasse exists." By this letter, the Local submitted the matter to the Impasses Panel per Sections 5 and 17 of Executive Order 11491. On January 9, 1970, James H. Nease, Director of BHA, wrote plaintiff Harney that he was serving notice under Article (31) of a BHA "desire to amend Article 4 and Articles 7 through 17, except Article 12, of the Agreement and such other Articles as are required to be changed by Executive Order 11491."

13. On February 12, 1970, plaintiffs Harney and Boulder told Senator John J. Williams about an alleged "performance of a Lesbian sex demonstration" in the hotel room of an official of BHA during a BHA conference in Saint Louis, Missouri, during the week of December 2, 1969; the

alleged misuse of High Quality Increases; and a project for "staff development associates." The story later appeared in Jack Anderson's *Washington Merry-Go-Round* which said that the story was true.

14. On February 13, 1970, W. V. Gill, Executive Director of the Federal Labor Relations Council, told plaintiff Harney that he had been told by the Director of the Federal Mediation and Conciliation Service that mediation efforts had not been exhausted. On February 19, 1970, plaintiff Harney asked the Director of the Federal Mediation and Conciliation Service to clarify his position. On March 2, 1970, plaintiff Harney notified the Federal Mediation and Conciliation Service that the Local was ready to meet with the Service at any time provided the meeting would not change the "prior recognized deadlocked status."

15. On March 1, 1970, 'Dialogues at The Potter's House", a taped talk show in which plaintiffs Harney and Boulder had appeared, was broadcast over radio station WGTS-FM. The two plaintiffs had discussed difficulties the Local had had wtih BHA, the Civil Service Commission, and defendant John Griner.

16. Defendants Griner and Johnson thereupon and then agreed, conspired, and confederated with defendant Finch; Charles M. Erisman, Director of BHA; Louis Zawatzky, Deputy Assistant Commissioner of Social Security; Commissioner Robert M. Ball of the Social Security Administration; and others, to cause the destruction of the Local, the discrediting of plaintiffs Harney and Boulder, and separation from their employment, all to their great loss and damage, as hereinafter set forth. In effecting said wrongful and unlawful scheme, and in furtherance of its accomplishment, defendants and their co-conspirators committed, among other things, the following overt acts:

a. On March 4, 1970, defendant Esther Johnson, in a letter to plaintiff Harney, took notice of the March 1

broadcast and directed plaintiff Harney to pay what she erroneously alleged were the Local's back per capita taxes by March 16, 1970, under pain of being "disbanded".

b. On March 5, 1970, Charles M. Erisman, Acting Director of BHA, in a letter to plaintiff Harney, informed the Local that because of what he falsely alleged was its failure to respond to the January 9, 1970, notice given by Mr. Nease, the Basic Agreement would "expire and terminate" on March 13, 1970. On March 9, 1970, plaintiff Harney told Mr. Erisman that he was referring Mr. Erisman's March 5 notice to the Federal Mediation and Conciliation Service and to the Federal Labor Relations Council. He also told Mr. Erisman that the Local held to the position that they were and had been in negotiation status.

c. On March 30, 1970, defendant Griner by a letter to plaintiff Harney gave the Local fifteen days to pay up or have "the plates pulled".

d. On April 20, 1970, defendant Johnson notified the members of the Local that their names had been removed from the mailing list of *The Government Standard*, the official publication of AFGE.

e. On May 6, 1970, defendant Griner, by a letter addressed to Robert M. Ball, Commissioner, Social Security Administration, notified management that he had suspended the Local.

f. On May 18, 1970, defendant Griner, by a letter addressed to Commissioner Ball, advised him that "the dues check off allotments of Local 2340 should be terminated" and that "this termination" could be rescinded only by the National Office of AFGE.

g. On June 4, 1970, Louis Zawatzky, Deputy Assistant Commissioner for Employee Relations of the Social Security Administration, by a letter addressed to James H. Anderson, Attorney for the Local, informed the Local that

"we have requested the Central Payroll Division, Department of Health, Education, and Welfare, to establish an escrow account into which all monies collected under the Local's dues check off agreement will be deposited."

h. Defendant Virginia L. Cramer began withholding collected dues from the Local with the pay period 05/16/70. No payments have been made to the Local since.

i. On August 3, 1970, Charles M. Erisman issued his "procedure for granting time to union officials in BHA to conduct union-management activities", designed and intended to curtail the activities of the officers of the Local to such an extent as to make it impossible for them to function. Plaintiffs Harney and Boulder have since then continued to operate as they and their predecessors in office had always done.

j. Beginning August 7, 1970, management, through Charles M. Erisman, Harold B. Siegel, Irwin A. Friendenberg, Edwin W. Semans, Jr., Bernard Dowgiello, and Leonard Portuguese, has decreed that plaintiffs Harney and Boulder are to be carried as absent without leave until they "comply with the requirements" of the August 3, 1970, Memorandum.

k. On September 9, 1970, defendant Griner notified plaintiff Harney and DHEW that he had "revoked" the Local's Charter. This information was passed on to "all central office employees" of BHA by Charles M. Erisman on September 15, 1970.

l. Plaintiffs believe that DHEW quit withholding for union dues during the pay period ending 10/17/70.

m. On November 12, 1970, defendants Richardson and Farmer, with full knowledge of all that had transpired, joined the conspiracy and refused to "release" the "escrowed" money which belong to the Local or its members.

WHEREFORE, plaintiffs demand judgment:

(1) That defendants account to plaintiffs for all moneys received by check off and retained by them in a so-called "escrow" account;

(2) That upon such accounting plaintiff Local No. 2340 have judgment against defendants jointly and severally for the amount found due thereon;

(3) That defendants account to plaintiffs Harney and Boulder and that they have judgment for the amount of salary withheld from them since August 7, 1970, with interest;

(4) That Local No. 2340 is in good standing with AFGE with a charter that has never beeen revoked;

(5) That plaintiffs have compensatory damages in the amount of $50,000.00;

(6) And for such other and further relief as the Court may deem just and proper.

ROBERT E. HARNEY
Plaintiff

JOSEPH C. BOULDER
Plaintiff

BYRON N. SCOTT
Attorney for Plaintiffs

1010 Vermont Avenue, N.W., #920
Washington, D.C. 20005

Of Counsel

VAN A. STILLEY

LIBRARY
SUPREME COURT, U. S.

No. 73-433

FILED
NOV 19 19

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT E. HARNEY AND JOSEPH C. BOULDER,
PETITIONERS

v.

JOHN F. GRINER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-433

ROBERT E. HARNEY AND JOSEPH C. BOULDER,
PETITIONERS

v.

JOHN F. GRINER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

1. Petitioners were officers of Local 2340, American Federation of Government Employees (AFGE), which represented employees within the Bureau of Hearings and Appeals (BHA) of the Social Security Administration, Department of Health, Education, and Welfare (HEW). Petitioners, who were also employees of BHA, had been spending full time on union business from 1966 to August 1970.

Pursuant to Section 20 of E.O. 11491, 34 Fed. Reg. 17605, 17614, which became effective on January 1,

1970,[1] and HEW's amended Personnel Instruction on union activities issued on April 1, 1970,[2] BHA issued a memorandum on August 3, 1970, revising its policy on the "Use of Official Time" for union business (Appendix, *infra*, p. 9). That memorandum provided in substance that union officials must spend their normal duty hours on government work unless they are authorized by their supervisors to conduct union business. The memorandum set forth the types of union activities for which authorization could be approved, such as labor-management meetings, preparation for formal hearings on employee discipline, and the handling of informal grievances.

BHA had furnished to petitioner Harney a draft of this memorandum on July 21, 1970, had sought

---

[1] Section 20 of E.O. 11491 provides:

> *Use of official time.* Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management.

The references in this brief to E.O. 11491 are to the text as it read during 1970. For the current text, see 3 C.F.R., Ch. IV, Codified Presidential Documents, E.O. 11491.

[2] Personnel Instruction 711-1, § 711-1-180, as amended on April 1, 1970, provided in pertinent part:

> Employees who perform as representatives of labor organizations are Federal employees and as such are expected to accomplish the duties assigned to them. They will be permitted a reasonable amount of time to prepare and present identifiable grievances, appeals, and other representations.

his comments, and asked if Harney wished a meeting to discuss the draft. Gov. App. 16I-1.[3] Harney, however, wrote directly to the Secretary of HEW (with a copy to BHA) discussing complaints against the acting director of BHA, and expressing criticism of BHA's proposal. Gov. Ex. 3, Att. C.

Subsequently on September 11, 1970, the acting Director of BHA wrote to petitioner Harney expressing his readiness to discuss "the question of the use of official time * * * looking to a new agreement under the provisions of E.O. 11491." Gov. Ex. 3, Att. D.

In the meantime, petitioners continued to devote themselves exclusively to union business without complying with the terms of BHA's August 3 memorandum. As a result, beginning in August 7, 1970, BHA carried petitioners as absent without leave (Pet. App. Ex. C, 12a).

Petitioners instituted this suit in the district court seeking, *inter alia*, back pay for the period for which petitioners had been placed in the absent without leave status.[4]

---

[3] The reference "Gov. App." is to the appendix to the government's brief in the court of appeals. The reference "Gov. Ex." is to the Exhibits filed by the Government in the district court.

[4] Petitioners' complaint also relief sought from the government officials and AFGE President Griner with respect to such matters as the revocation of the Local's charter and its right to dues collected by means of the check-off (Pet. App. Ex. C, 13a). While those claims represented a very substantial part of petitioners' claims below, petitioners no longer assert them in this Court.

The district court dismissed petitioners' claim that BHA had improperly placed them in absent without leave status, on the ground that this claim was based on an Executive Order of the President, E.O. 11491, and thus did not involve a justiciable controversy, citing *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F. 2d 451, 456-457 (C.A.D.C.), certiorari denied, 382 U.S. 978 (Pet. App. Ex. B, 4a). The court of appeals affirmed (Pet. App. Ex. A, 1a-2a).

2. The decisions below are correct and further review by this Court is not warranted.

a. Petitioners' claim against the Government, as reflected in their complaint, boils down to the assertion that BHA had improperly interpreted and implemented the "Use of Official Time" provision of E.O. 11491. Thus, the district court correctly declined jurisdiction of this labor-management dispute under the principles of *Manhattan-Bronx Postal Union* v. *Gronouski*, *supra*.[5] In *Manhattan-Bronx* the court of appeals had held that the predecessor Executive Order (No. 10988) did not create judicially enforceable rights, and that disagreements as to implementation of the order had to be resolved within the Executive Branch.

---

[5] The preclusion of jurisdiction confirmed by *Manhattan-Bronx* was later held subject to an exception where plaintiff claims that the administration of the Executive Order "clashes with basic constitutional safeguards." *National Association of Government Employees* v. *White*, 418 F. 2d 1126, 1130 (C.A.D.C.). Petitioners did not rely in the district court upon any invasion of constitutional rights, and the court thus correctly found *Manhattan-Bronx* dispositive of their claim against the government.

b. Moreover, even assuming *arguendo* that petitioners' claim was justiciable, dismissal was in any event required for the additional reason that petitioners did not exhaust the administrative remedies provided by E.O. 11491. Petitioners' claim, that the government improperly withheld their salaries for engaging in union activities, falls within the unfair labor practices set forth in E.O. 11491.[6] The Executive Order vests primary jurisdiction over such unfair labor practices in the Assistant Secretary of Labor for Labor-Management Relations (Section 6), and thereafter in the Federal Labor Relations Council (Section 4). Petitioners admittedly did not seek relief under these provisions of E.O. 11491. Dismissal of their action was therefore mandated by the principle of exhaustion of administrative remedies. *E.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51; *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279, 296-297; *McKart* v. *United States*, 395 U.S. 185, 193-195.

---

[6] Section 19(a)(1) makes it an unfair labor practice to "interfere with, restrain, of coerce an employee in the exercise of the rights assured by this Order." Section 1, in turn, guarantees the employee "the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization * * * and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization * * *."

In addition, Section 19(a)(2) makes it an unfair labor practice to "encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment."

c. Finally, petitioners also contend that their Due Process rights were violated when their pay was withheld without a prior evidentiary hearing (Pet. 7). However, this Due Process question was not presented to the district court; accordingly, the question was not timely asserted in the court of appeals, nor is it properly before this Court. Cf. *United States* v. *Tucker Truck Lines*, 344 U.S. 33.

In any event, there is no merit to petitioners' Due Process argument. As the petition makes clear (Pet. 4-5), petitioners' challenge to the administrative action presents only questions of law relating to the proper interpretation of E.O. 11491 and related instructions; no material facts are in dispute. See Pet. 4-5, 6-8. Thus, there was no occasion for a prior evidentiary hearing since such a hearing would be required by due process only where "important decisions turn on questions of fact." *Goldberg* v. *Kelly*, 397 U.S. 254, 269; *Mills* v. *Richardson*, 464 F. 2d 995, 1001 (C.A. 2). In all events, petitioners were afforded a prior opportunity to comment on BHA's August 3 memorandum, which restricted the use of official time for union matters, and then were invited thereafter to negotiate a new agreement with respect to the use of official time. These opportunities for discussion, together with the procedures available under E.O. 11491 for resolution of the unfair practices, afforded due process for resolution of petitioners' claim to payment of their full government salaries while they pursued only union business. See, *Fuentes* v. *Shevin*, 407 U.S. 67, 96-97; *Board of Regents* v. *Roth*, 408 U.S. 564, 570.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[7]

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

[7] A different Due Process question is raised by *Phillips* v. *Kennedy*, No. 72-1118, which deals with the procedural rights of employees who are removed under the provisions of the Lloyd-LaFollette Act, 5 U.S.C. 7501. Unlike *Kennedy*, the present case does not involve removal, or employee rights under the Lloyd-LaFollette Act. Moreover, in direct contrast to the employee in *Kennedy*, petitioners here did not timely assert their Due Process contention. There is therefore no reason for the Court to defer consideration of this petition pending final disposition of *Kennedy*.

APPENDIX

MEMORANDUM

DATE: Aug. 3, 1970

REFER TO: HA:BD

TO : See Below

FROM : Charles M. Erisman, Acting Director
Bureau of Hearings and Appeals

SUBJECT: Use of Official Time

The Department has issued new instructions which require that we review the use of official time by the officials of AFGE Local #2340.

The new Instruction 711-1, "Labor-Management Relations in the Federal Service," states in part:

> "Employees who perform as representatives of labor organizations are Federal employees and as such are expected to accomplish the duties assigned to them. They will be permitted a reasonable amount of time to prepare and present identifiable grievances, appeals, and other representations."

All prior Bureau instructions on the use of official time by officials of AFGE Local #2340 are hereby revoked. Unless authorized in accordance with the provisions of this memorandum, Union officials are required to be at their work stations performing their assigned duties except, of course, for short absences accorded all employees, e.g., coffee breaks. Outlined below is the procedure for granting official

time to Union officials in BHA to conduct union-management activities.

1. *Meetings requested by management*

   Formal meetings requested by management officials (e.g. Bureau Director, Assistant Bureau Directors, etc.)—Management official calling the meeting should arrange for use of time by having the labor relations specialist contact the Union official's first line supervisor. Official time for recurring or regularly scheduled meetings between the Union and management will be arranged in the same way.

2. *Meetings requested by the Union*

   In cases where the Union wishes to initiate a meeting with management officials, they should get in touch with the management official concerned and request the meeting. That official will arrange for official time by contacting the Union representative's first line supervisor through the labor relations specialist.

3. *Formal hearings*

   Time needed to prepare for formal hearings (discrimination, adverse action, grievance)—Union should make request to hearing coordinator or the labor relations specialist (in cases where there is no coordinator) and that official should notify the first line supervisor of the time authorized for preparing the case.

4. *Informal complaints and grievances of employees*

   Union should notify first line supervisor of fact that Union assistance is requested by an em-

ployee. Union should provide following information when requesting time:

(1) The nature and type of the complaint and the branch where the complaint originated, or in lieu of this information, at the option of the Union, the name of the employee(s) involved.

(2) Where Union official can be reached.

(3) Amount of time needed (approximate).

This information should be supplied to first line supervisor before Union representative leaves his work site.

Where items 1 through 3 are complied with, official time may be authorized in advance by the first line supervisor. If, in an emergency, authorization cannot be obtained in advance, the time used must be requested and justified by the Union official and is subject to the approval (or disapproval) of the Branch Chief.

5. Preparation of comments on personnel issuances or other materials prepared by management and submitted to Union for comment—The Union should inform the supervisor or management representative of the amount of official time needed and get authorization.

Every employee should be able to comply with the reasonable request that he furnish satisfactory information as to his specific whereabouts. However, should an employee upon request fail to furnish information as to his whereabouts or should he furnish obviously unsatisfactory information, the immediate supervisor will initiate appropriate action to insure

proper certification of that employee's time and attendance record.

This instruction will be effective immediately upon issuance.

/s/ Charles M. Erisman
CHARLES M. ERISMAN

Approved /s/ Louis Zawatzky
Deputy Assistant Commissioner
for Employee Relations, SSA

Mr. Harold B. Siegel, Assistant Bureau Director, Program Operations
Mr. Thomas E. Bennett, Deputy Assistant Bureau Director, Field Operations
Mr. Edward D. Colleran, Director, Division of Administration
Dr. Harold I. Passes, Acting Chief Medical Officer
Mr. John P. McEleney, Assistant to the Director for Equal Opportunity and Labor Relations
Mr. Robert E. Harney, President, AFGE Local #2340

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 526560 126